

**Public Prosecutor v Mohd Najimuiddin bin Nasaruddin &
Anor**

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HIGH COURT (KANGAR) — CRIMINAL CASE NO 45–02 OF 2206
ZAMANI A RAHIM JC
18 MARCH 2010

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*Criminal Law — Penal Code — s 302 read with s 34 — Murder and common
intention — Whether both accused had necessary intention to kill — Whether
charge ought to be amended to culpable homicide not amounting to murder under
s 304(a) read with s 34 of the Penal Code — Appropriate sentence — Whether
discount for pleading guilty to amended charge ought to be given*

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*Criminal Procedure — Trial — Prosecution's case — Defence putting suggestions
to witnesses during cross-examination of prosecution witnesses — Suggestions
denied — Effect on evidence — Failure to put defence case to prosecution
witnesses at earliest opportunity, effect of*

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Both accused persons were charged with murder under s 302 read with s 34
of the Penal Code ('Code'). The issue for the High Court was whether the
prosecution had made out a prima facie case against both accused as charged.

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Held, convicting and sentencing both accused on amended charge:

- (1) At the close of the prosecution's case, a maximum evaluation of the
prosecution evidence is required (see para 2).
- (2) In the instant case, there was ample evidence to show that the victim
died as mentioned in the charge. It was the first accused who had
delivered the fatal blow by hitting the victim on the head with a crash
helmet. The victim's death was caused by head injury due to blunt
trauma, which was clearly caused by the crash helmet. Although the
second accused did not land this blow, he was equally liable under s 34
of the Code (see paras 7, 17 & 19).
- (3) It is essential to put the defence case at the earliest reasonable
opportunity during the cross-examination of the prosecution witnesses.
Failure by the defence to put its case to the prosecution witnesses may
result in the defence being construed as an afterthought or a recent
invention. However, the defence version of events may only be
considered by the court at the defence stage when the defence is called.
Mere suggestions put by defence counsel to prosecution witnesses in

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- A cross-examination during the prosecution's case and any denial thereto has little or no evidential value (see para 20).
- (4) There was no evidence of intention as prescribed under limbs (a), (b) and (c) of s 300 of the Code. Both accused persons had no intention to kill the victim. They had requested SP14 to call for an ambulance to take the victim to the hospital. The victim did not die instantaneously but only succumbed to his head injury in hospital. The prosecution had made out a prima facie case against both accused persons on the offence of culpable homicide not amounting to murder under s 304(a) of the Code. Pursuant to s 158 of the Criminal Procedure Code, the court amended the charge to one under s 304(a) of the Code read in conjunction with s 34 of the same Code (see paras 35–38).
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- (5) Both accused were convicted on their voluntary pleas of guilty to the amended charge. Although the second accused had seven previous convictions, the convictions were for different types of crimes. Notwithstanding their pleas of guilty, in the instant case such pleas could not be construed as mitigating factors and no discount ought to be given. Both accused persons ought to be sentenced to 12 years' imprisonment from their date of arrest (see paras 39 & 43).
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[Bahasa Malaysia summary]

- Kedua-dua tertuduh telah didakwa membunuh di bawah s 302 dibaca bersama s 34 Kanun Keseksaan ('Kanun'). Isu bagi Mahkamah Tinggi adalah sama ada pendakwaan berjaya membuktikan kes prima facie terhadap kedua-dua tertuduh di atas pertuduhan yang dituduh.
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Diputuskan, menyabitkan dan menghukum kedua-dua tertuduh terhadap pertuduhan terpinda:

- G (1) Penilaian maksimum keterangan pendakwaan pada peringkat penutupan kes pendakwaan adalah diperlukan (lihat perenggan 2).
- (2) Dalam kes ini, terdapat bukti yang memadai bagi menunjukkan bahawa mangsa telah mati sebagaimana dinyatakan dalam pertuduhan.
- H Tertuduh pertama yang telah membuat pukulan menyebabkan kematian dengan memukul si mangsa di kepala dengan topi keledar. Kematian si mangsa disebabkan oleh kecederaan kepala disebabkan oleh *blunt trauma*, yang jelas disebabkan oleh topi keledar tersebut. Walaupun tertuduh kedua tidak membuat pukulan ini, dia bersama-sama bertanggungjawab di bawah s 34 Kanun tersebut (lihat perenggan 7, 17 & 19).
- I (3) Adalah penting untuk mengemukakan kes pembelaan pada peluang terawal yang munasabah semasa soal balas saksi pendakwaan. Kegagalan oleh pembelaan untuk mengemukakan kesnya kepada saksi

pendakwaan boleh mengakibatkan pembelaan tersebut ditafsirkan sebagai sesuatu perkara yang difikirkan kemudian atau suatu rekaan. Walau bagaimanapun, versi peristiwa pembelaan hanya boleh dipertimbangkan oleh mahkamah di peringkat pembelaan apabila pembelaan dipanggil. Pengataan semata-mata yang dicadangkan oleh peguambela kepada saksi pendakwaan dalam pemeriksaan balas semasa kes pendakwaan dan apa-apa penafian berikutnya mempunyai sedikit atau tiada nilai keterangan (lihat perenggan 20).

- (4) Tidak terdapat apa-apa bukti niat seperti yang diperuntukkan di bawah bahagian (a), (b) dan (c) s 300 Kanun tersebut. Kedua-dua tertuduh tidak mempunyai niat membunuh mangsa. Mereka telah meminta SP14 untuk memanggil sebuah ambulans untuk membawa mangsa ke hospital. Mangsa tidak mati serta-merta tetapi hanya mati akibat kecederaan kepalanya di hospital. Pendakwaan berjaya membuktikan kes prima facie terhadap kedua-dua tertuduh bagi kesalahan melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh di bawah s 304(a) Kanun tersebut. Mahkamah di bawah s 158 Kanun Prosedur Jenayah, meminda pertuduhan tersebut kepada pertuduhan di bawah s 304(a) Kanun tersebut dibaca bersama s 34 Kanun yang sama (lihat perenggan 35–38).
- (5) Kedua-dua tertuduh telah disabitkan atas pengakuan bersalah yang dibuat secara sukarela terhadap pertuduhan terpinda. Walaupun tertuduh kedua mempunyai tujuh sabitan lalu, sabitan-sabitan tersebut adalah untuk jenis jenayah berbeza. Walaupun mereka mengaku bersalah, dalam kes ini pengakuan sedemikian tidak boleh ditafsirkan sebagai faktor-faktor mitigasi dan tiada diskaun harus diberi. Kedua-dua tertuduh harus dijatuhkan hukuman penjara selama 12 tahun bermula dari tarikh penangkapan mereka (lihat perenggan 39 & 43).]

Notes

For cases on Penal Code in general, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1262–2016.

For cases on prosecution's case, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4939–4952.

Cases referred to

Alcontara all Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Chung Kum Moey v PP [1967] 1 MLJ 205, PC (refd)

Hari Ram v State of Uttar Pradesh [2004] 3 LRI 523, SC (refd)

Low Soo Song v PP [2009] 3 MLJ 36; [2009] 3 CLJ 309, FC (refd)

Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528; [2006] 1 CLJ 1043, CA (refd)

- A** *Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
PP v Dato Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Kammoon Wannga & Anor [2009] 8 MLJ 430, HC (refd)
PP v Kang Chee Whei [2002] MLJU 550; [2002] 8 CLJ 807, HC (refd)
- B** *PP v Mohan Singh all Lachman Singh* [1999] MLJU 218; [1999] 4 CLJ 620, HC (refd)
PP v Syed Halil bin Syed Mohamad Ali & Anor [2007] MLJU 481; [2007] 9 CLJ 718, HC (refd)
- C** *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466, CA (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Yeap Boon Hai v PP [2010] 2 MLJ 433; [2010] 2 CLJ 338, FC (refd)

D Legislation referred to

Criminal Procedure Code s 180, 180(1), (2), (3)
 Evidence Act 1950 ss 114(g), 134
 Penal Code ss 34, 299, 300, 300(a), (b), (c), 302, 304(a), (b)
 Penal Code [SG] ss 299, 300

- E** *Azman bin Abu Hassan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.*
Suhaila bt Ahmad (Devandran & Co) for the first accused.
Abdullah bin Abd Rahman (Abdullah & Teoh) for the second accused.

F Zamani A Rahim JC:

THE CHARGE

- G** [1] Mohd Najimuddin bin Nasaruddin, OKT1 and Mazlan bin Mat Zain, OKT2 were charged with an offence of murder under s 302 of the Penal Code read together with s 34 of the same Code. The charge reads as follows:

- H** Bahawa kamu bersama-sama pada 18 Jun 2005 jam lebih kurang 2.30 pagi di Batu 6 3A, Jalan Kaki Bukit, Beseri, dalam Negeri Perlis bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Azmeer bin Azmi (No.KP: 620524-71-5099) dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 302 Kanun Keseksaan di baca bersama Seksyen 34 Kanun yang sama.

I PRIMA FACIE CASE

[2] At the close of the prosecution case, we are subjected to a prima facie phrase requiring a maximum evaluation of the prosecution evidence presented before the court. As regard the phraseology prima facie case, s 180

of the Criminal Procedure Code provides as follows:

- (1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused;
- (2) If the court finds that a prima facie case has not been made out against the accused, the court shall record an order of acquittal;
- (3) If the court finds that a prima facie case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

[3] Thus whether the accused is acquitted or called to enter his defence at the close of the prosecution case depends upon whether the prosecution has made out a prima facie case against the accused on the offence charged. What is a prima facie case? In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 the Federal Court has dealt with the phrase 'prima facie case' as follows at p 315 (MLJ); p 99 (CLJ):

A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whitley's Law Dictionary* (11th Ed) as:

A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

[4] The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

And continuing at p 316 (MLJ); p 100 (CLJ):

The test at the close of the case for the prosecution would therefore be. Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case of the prosecution. If there is any such doubt there can be no prima facie case.

- A [5] The steps to be observed by the trial court at the close of the prosecution case are summarised as follows:

In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 the Federal Court has this to say at p 399 (MLJ); p 465 (CLJ):

- B After the amendments to ss 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a subordinate court and the High Court under the amended section is to call for the defence when it is satisfied that a prima facie case has been made out at the close of the prosecution's case. This requires
- C the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter on his or her defence. It involves an assessment of the credibility of the witness called by the prosecution and the drawing of inferences admitted by the prosecution's evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See *Tai Chai Keh v Public Prosecutor* [1948–49] MLJ Supp 105; *Public Prosecutor v Kassim bin Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution's case, comes to the conclusion that a prima facie case has not been made out, it should acquit the accused. If, on the other had, the court after
- E conducting a maximum evaluation of the evidence comes to the conclusion that a prima facie case has been made out, it must call for the defence. If the accused elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of
- F any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the prima facie case, one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss 173(f) and 180 of the CPC is to ask itself the question. If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2
- G MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

H INGREDIENTS OF THE OFFENCE

- [6] At the end of the case for the prosecution, let us now proceed to assess and evaluate the evidence in relation to the essential ingredients to sustain an offence of murder under s 302 of the Penal Code. The main ingredients being
- I as follows:

- (a) Azmeer bin Azmi had died on 18 June 2005 at about 2.30am (deceased);
- (b) The deceased death was caused by the acts of OKT1 and OKT2;

- (c) Such acts were done with the common intention: A
- (i) to cause the death, or
 - (ii) to cause such bodily injury as OKT1 and OKT2 knew to be likely to cause the death, or B
 - (iii) to cause bodily injury which in the ordinary course of nature is sufficient to cause death, or
 - (iv) with the knowledge that such acts were so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and OKT1 and OKT2 committed such acts without any excuse for incurring the risk of causing death or such injury as aforesaid. C

[7] As to ingredient (a) above, there was ample evidence to show that the deceased had died on 18 June 2005 at about 2.30am mentioned in the charge. Throughout the trial this fact has not been disputed by the defence. D

[8] The next issue is whether the death of the deceased was caused by OKT1 and OKT2. In other words, were the injuries sustained by the deceased were inflicted by OKT1 and OKT2. It is this part that the prosecution's case is solely dependent on an eye witness, Ahmad bin Saad, SP14. The material part of SP14's evidence in examination-in chief runs as follows: E

Pada malam itu, jam lebih kurang 10.00 malam, OKT1 ada datang ke rumah Azmeer. Masa OKT1 datang, saya dan Azmeer berada di dalam rumah, di bilik satu, bilik tidur. Saya nampak OKT1 datang berjalan kaki seorang diri. F

Apabila tiba dekat tingkap, saya dengar OKT1 memanggil Azmeer. OKT1 memanggil dekat tingkap di bahagian hadapan rumah Azmeer. OKT1 tanya Azmeer 'Bang Meer, motornya ada di mana?' Azmeer menjawab 'Moto hang, aku tinggal di Klinik Menon'. Nada suara kedua-dua mereka biasa sahaja. Selepas itu, OKT1 beredar dari rumah Azmeer. G

Sebelum OKT1 beredar dari rumah Azmeer, Azmeer tidak memberi apa-apa kepada saya. Selepas OKT1 dah pergi, Azmeer beritahu saya sebenarnya motor OKT1 dia letak di belakang rumahnya (ie rumah Azmeer). H

Selepas itu, Azmeer mengajak saya mengikutinya pergi kerumah Rizal dengan 2 buah motorsikal yang berasingan. Azmeer menunggang motorsikal OKT1 dan saya menunggang motorsikal saya. Saya tidak ingat nombor motorsikal OKT1. Saya kenal dengan Rizal ini. Dia adalah kawan saya. Saya tidak tahu sama ada Rizal kawan Azmeer atau tidak. I

1) Rizal bin Abdul Rahman (dipanggil dan dicamkan oleh saksi).

Rumah Rizal ialah terletak di Kampung Tunjung, Beseri. Jarak rumah Azmeer dengan rumah Rizal ialah lebih kurang 3 kilometer.

- A** Apabila tiba di rumah Rizal, Azmeer telah berjumpa dengan Rizal. Saya ada bersama ketika itu. Azmeer telah menyerahkan anak kunci motorsikal OKT1 bersama dengan motorsikal kepada Rizal. Saya dengar Azmeer menyuruh Rizal menyerahkan kunci dan motorsikal itu kepada OKT1.
- B** Setelah anak kunci dan motorsikal OKT1 diserahkan kepada Rizal, saya dan Azmeer pulang ke rumah Azmeer dengan motorsikal saya. Saya tidak ingat siapakah yang menunggang motorsikal saya ketika itu.
- C** Saya dan Azmeer tiba di rumah Azmeer kira-kira jam 11.00 malam. Selepas itu, Azmeer beritahu saya dia hendak pergi berjumpa dengan ibunya dekat 'roundabout' Bandar Kangar. Saya tidak ikut Azmeer. Saya duduk di rumah Azmeer seorang diri. Azmeer beredar dengan menaiki motorsikal saya.
- D** Lebih kurang 2 jam kemudian, Azmeer telah kembali ke rumahnya. Masa itu jam lebih kurang 1.00 pagi 18/6/2005. Pada masa itu, OKT1 dan OKT2 telah datang ke rumah Azmeer. Masa OKT1 dan OKT2 datang, saya berada dalam rumah. Saya melihat OKT1 dan OKT2 datang melalui cermin tingkap di rumah Azmeer. Saya lihat OKT1 dan OKT2 berjalan kaki pada waktu itu. Saya tidak pasti tetapi salah seorang dari mereka memegang sesuatu benda panjang lebih kurang pembaris yang berada dalam mahkamah.
- E** Mahkamah: - panjang pembaris ialah lebih kurang 2 kaki. Kedua-dua OKT yang berada dalam kandang orang salah tunduk kepala pandang ke bawah.
- Apabila mereka tiba di bahagian pintu rumah Azmeer, OKT1 telah memanggil Azmeer. Selain dari itu, saya tidak dengar apa-apa lagi. Masa ini Azmeer ada bersama-sama saya dalam rumah itu.
- F** Pada masa itu Azmeer menyuruh OKT1 pergi memanggil OKT2 sebab dia tidak mahu bercakap dengan OKT1. Azmeer mahu bercakap dengan OKT2. Saya tidak ingat sama ada OKT1 jawab (respond) balik atau tidak.
- G** Saya beritahu kepada Azmeer, OKT1 telah datang semula bersama-sama OKT2. Selepas itu Azmeer telah membuka pintu besar hadapan dan keluar dari rumahnya. Saya tidak ikut Azmeer keluar dari rumah itu pada masa itu. Tetapi saya dapat lihat apa yang berlaku diluar rumah. Saya lihat melalui pintu besar hadapan yang terbuka. Selepas itu saya turut keluar dari rumah itu. Semasa Azmeer keluar dari rumah, dia tidak membawa 'fork' motosikal itu keluar. Dia tangan kosong.
- H** Semasa saya berada di luar rumah itu, saya lihat Azmeer 'ligan' (kejar) OKT2. OKT2 melarikan diri. Azmeer tidak dapat kejar OKT2. Lepas itu, saya lihat Azmeer lalu di hadapan OKT1 dan OKT1 telah pukul Azmeer dengan helmet. Saya lihat helmet itu mengenai di bahagian belakang kepala Azmeer. Saya lihat Azmeer telah jatuh ke tanah. Masa itu OKT2 datang semula dengan membawa suatu benda leper berbalut dengan kertas. Benda itu panjangnya lebih kurang 2 kaki. OKT2 berkata 'Baru hang ada akal, sebab hang duk buat macam ni kat orang. Hang duk kencing kat orang. Hang duk buat kat orang'. Ada lagi perkataan-perkataan yang dilafazkan oleh OKT2 tetapi saya tidak ingat. Pada fahaman saya OKT2 kata begitu sebab Azmeer membuat perkara-perkara yang tidak elok seperti mengambil barang-barang tetapi tidak bayar.
- I**

Azmeer yang jatuh ke tanah itu merangkak dan dia jatuh balik. Saya lihat OKT1 pukul Azmeer lagi dengan helmet dan kena sebelah kanan kepala Azmeer. Saya lihat OKT1 memukul Azmeer dengan helmet berkali-kali. Azmeer berada di atas tanah dalam keadaan mengiring.

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Masa OKT1 memukul Azmeer, saya dengar Azmeer kata 'sakit, sakit'. OKT2 pula berleter kepada Azmeer.

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Saya juga melihat OKT2 ada memukul Azmeer. Dia juga memukul dengan menggunakan helmet dan benda panjang leper yang berbalut dengan kertas. Masa itu saya lihat benda yang panjang berbalut kertas itu adalah parang. Saya tidak pasti OKT2 pukul Azmeer dengan mata parang atau belakang parang. *OKT2 memukul Azmeer dibahagian lutut ke bawah.*

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Melihat pergaduhan ini, saya menyuruh mereka 'settle' elok-elok kerana semuanya kawan. Saya tidak pasti siapa yang berkata tetapi saya dengar lebih kurang macam ini 'Hang diam Mat. Sat lagi dengan hang-hang.'

Selepas itu, OKT1 dan OKT2 terus memukul Azmeer silih berganti. *Salah seorang dari mereka, saya tidak ingat sama ada OKT1 atau OKT2, menyuruh saya memanggil ambulans.* Masa ini pukulan ke atas Azmeer sudah berkurangan.

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[9] It was earlier established in the evidence of SP14 that 'Din' was identified as OKT1 and 'Lan' was identified as OKT2.

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[10] SP14 continued his evidence in examination-in-chief as follows:

S: Apakah sebab pergaduhan ini berlaku?

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J: Saya tidak ingat sebab-sebab pergaduhan itu. Sekarang saya ingin nyatakan OKT1 telah datang berjumpa Azmeer menanyakan di mana motorsikal dan Azmeer memberitahu motorsikal OKT1 berada di Kangar, sedangkan sebenarnya motorsikal itu berada di belakang rumah Azmeer. Saya tidak tahu bagaimana motorsikal OKT1 boleh berada di belakang rumah Azmeer. Azmeer sembunyikan kepada OKT1 yang motorsikal itu berada di belakang rumahnya kerana Azmeer mahu OKT2 yang datang berjumpanya. Azmeer hendak berjumpa dengan OKT2 kerana OKT2 telah mengambil handphone emaknya dan telah sandarkan. Perkara ini diberitahu oleh Azmeer kepada saya.

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[11] In cross-examination, SP14 said that he could see the deceased was assaulted by OKT1 and OKT2 at a distance of approximately 40 feet. The place of assault was neither too dark, nor too bright. He categorically denied that he could not see the incident. It was visible. There were two street lights.

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A [12] Further in cross-examination, SP14 said, inter alia:

Pada masa kejadian, saya dan Azmeer sahaja yang berada di rumah itu. Semasa berada dalam bilik di rumah Azmeer, saya dan Azmeer sedang membalut batang 'fork' motosikal untuk dijadikan senjata.

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[13] As regard the motorcycle 'fork', SP14 said in re-examination as follows:

C Saya tahu Azmeer membalut batang 'fork' motorsikal untuk memudahkan ianya dipegang untuk menjadi senjata memukul OKT2.

D [14] Learned counsel for OKT1 argued that the solitary witness in this case was SP14. The place of incident was dark under the mango trees. He could not see the assault on that early hours of the morning. SP14 was said to be unreliable. Learned counsel cited *The Indian Penal Code* by Ratanlal & Dhirajlal, 31st Enlarged Edition 2006 at p 1410 where it was stated:

E It is worthy of mention that a witness may be wholly reliable, may be neither wholly reliable nor unreliable and may be wholly unreliable. Conviction on the testimony of a solitary witness is legal if he is wholly reliable.

F [15] The above passage was not cited in its proper perspective. In a murder case, it is untrue to say that conviction cannot be based on a solitary eye witness. On the contrary, such a view is directly inconsistent with s 134 of the Evidence Act 1950. It is the mandate of s 134 that quality and not quantity of evidence is material. Section 134 enshrines the well recognised maxim that 'Evidence has to be weighed not counted'. The matter thus depends upon the quality of evidence and circumstances of each case. If such a testimony is found to be entirely reliable, there is no legal impediment to the conviction of the accused on such evidence.

H [16] In the course of the trial, at times SP14 was a bit mentally slow to recollect events or rather the sequence of events that happened about four years ago. He may not have the memory and intelligence of the physicist, Albert Einstein but certainly his evidence was intelligible and credible for this court to act upon. From his demeanour in the witness box, he was a straight forward witness who spoke the truth. SP14's evidence disclosed that the injuries sustained by the deceased were caused by OKT1 and OKT2. I do not entertain any doubt regarding his evidence on the identity of OKT1 and OKT2 and the crash helmet, P63 which has been identified to have been used to strike the deceased's head. Learned counsel's argument that SP14's evidence was lacking corroboration for failing to call Shabir and his father is devoid of merit. We are not here dealing with sexual offences or offences with

sexual flavour where corroboration is required as a rule of practice. Neither the presumption of adverse inference under s 114(g) of the Evidence Act is applicable for failing to call Shabir and his father as prosecution witnesses.

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[17] Learned counsel also took exception for failure to establish who had actually used the crash helmet, P63 to assault the deceased. Was it OKT1 or OKT2? I too find this argument is without merit as the evidence showed that it was OKT1 who had hit the deceased's head with the crash helmet, P63. This was undoubtedly the fatal blow, though OKT2 did not strike it, he was equally liable by virtue of their common intention under s 34 of the Penal Code.

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[18] Further, contrary to learned counsel's submission that failure on the part of the investigating officer, Insp Nik Ahmad Kamal, SP20 to collect certain exhibits such as broken flower pot, a slipper, a sponge which is believed to have been peeled off from the inside of the crash helmet and blood stain under the mango tree is not fatal in any way to the prosecution's case. The relevant part of the decision in *Public Prosecutor v Syed Halil bin Syed Mohamad Ali & Anor* [2007] MLJU 481; [2007] 9 CLJ 718 relied upon by learned counsel may be distinguished on the facts of this case.

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[19] Of learned counsel's written submission, this is the most pertinent point. It has to do with the suggestions put to SP14 in cross-examination. Learned counsel for OKT1, having referred SP14 to a broken flower pot shown in photograph P4C, SP14 claimed ignorant why it was broken. The said learned counsel further suggested to SP14 that the broken flower pot was used in the fight and the deceased was hit once by OKT1 with a crash helmet to defend himself. Then learned counsel capitalised on the issue of broken flower pot in his written submission as follows:

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... Mengikut gambar P4 A-Q iaitu gambar tempat kejadian, terdapat serpihan pasu bunga pada tempat kejadian.

Ketika disoal balas pihak kami ada bertanyakan tentang pasu bunga yang pecah namun SP14 menjawab tidak tahu mengenai pasu bunga tersebut. Pihak kami percaya bahawa pasu bunga tersebut telah digunakan semasa pergaduhan berlaku. *Kemungkinan* terdapat suatu *provokasi* di antara si mati dan tertuduh-tertuduh. Dalam kes ini, tertuduh-tertuduh datang ke rumah si mati untuk mengambil motosikal milik OKT1. *Berkemungkinan* si mati telah menggunakan pasu bunga terlebih dahulu untuk menyerang OKT-OKT. Serangan tersebut tidak mengenai sasaran maka OKT-OKT telah menggunakan topi keledar untuk menyerang balas serangan tersebut. Serangan tersebut adalah suatu provokasi kepada OKT1 dan OKT2 di dalam pergaduhan ini yang menyebabkan kematian si mati. Sebenarnya OKT-OKT tidak mempunyai sebarang niat untuk membunuh si mati.

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- A Selepas pergaduhan berlaku si mati masih lagi hidup. OKT ada menyuruh SP14 memanggil ambulans bagi membawa si mati ke hospital. Ini jelas menunjukkan bahawa OKT-OKT tidak mempunyai (intention) ataupun mens rea untuk membunuh si mati pada malam kejadian. *Bahkan pergaduhan tersebut teretus daripada tindakan si mati sendiri yang menyerang kedua-dua tertuduh terlebih dahulu.*
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- [20] It is essential to put the defence case at the earliest reasonable opportunity in cross-examination of appropriate prosecution witnesses: see *Public Prosecutor v Dato Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1. Failure by the defence to put its case to the prosecution witnesses may be commented that the defence is an afterthought or a recent invention: see *Alcontara all Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209. In the instant case, learned counsel for OKT1 had quite properly, in the course of the prosecution case, put to SP4 about the broken flower pot which the defence obviously intended to lay out a defence of provocation. Unless SP14 has admitted to the suggestion levelled by learned defence counsel about the provocation, the counsel should not have raised it, as he did in the above quoted written submission. Learned counsel has in all probability fantasised that the broken flower pot was used by the deceased to attack OKT1 and OKT2. The broken flower pot was said to target OKT1 and OKT2 but missed them. As a result of the provocation, OKT1 and OKT2 retaliated back by striking the crash helmet at the deceased's head. Learned counsel concluded by saying that the quarrel was first started by the deceased who attacked both OKT1 and OKT2. Learned counsel submission is a mere speculation as he only *believed* the broken flower pot was used in the fight. Furthermore, SP14 denied having any knowledge of the said broken flower pot. It is not based on admissible evidence. The defence version of the story can only be considered for whatever it is worth by the court, when it is introduced at the defence stage when the defence is called. The mere suggestion put in cross-examination during the prosecution case and any denial thereto, as in this case, has little or no evidential value. It is yet to crystallise into evidence. In *Public Prosecutor v Mohan Singh all Lachman Singh* [1999] MLJU 218; [1999] 4 CLJ 620, Abdul Wahab Patil J said at p 645 as follows:
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- No other evidence being advanced, the prosecution evidence in respect of the other elements of the charge remain challenged only in submissions but not by any evidence after the defence has been called. In this regard it must always be borne in mind that questions put in cross-examinations of witnesses merely serve to lay out or give notice of the lines of defence. But questions in cross-examination themselves do not constitute evidence. What is therefore put to the witness can only gain credence for consideration only if, when the defence is called, evidence is led along the lines laid out in the cross-examination. If not followed up by
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leading evidence at the defence stage of the trial, then whatever has been put becomes of little moment as evidence, and may contribute even less to any submission made.

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[21] In evaluating the prosecution evidence at the close of its case, I do not take the accused anticipatory defence of provocation into consideration. I only take into consideration on maximum basis as guided by *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734. The prosecution evidence adduced and its circumstances pertaining to the essential ingredients of the offence charged.

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[22] Now I propose to scrutinise with the important features of SP14's evidence. It may be summarised thus:

(a) SP14 went to the deceased house that night at about 10pm to pledge his pawn ticket to the deceased. The deceased took the said pawn ticket but did not give him the money;

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(b) SP14's evidence disclosed that OKT1 first came to the deceased house alone that night to collect his motorcycle back from the deceased. The deceased told OKT1 that he had left the said motorcycle at Menon's Clinic at Kangar town. When OKT1 left his house, the deceased informed SP14 that he kept OKT1's motorcycle at the rear of his house. In other words, the deceased was lying to OKT1. According SP14 this was the cause of the altercation between the deceased, OKT1 and OKT2.

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(c) Before OKT1 came again that early morning, the deceased had already made advanced preparation and armed himself with the motorcycle 'fork' to use it as a weapon to confront OKT2. When OKT1 and OKT2 arrived, the deceased came out from the house and chased OKT2. The deceased did not manage to get him. The deceased had already adopted a confrontational stance towards OKT2;

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(d) The deceased was walking back passed OKT1, the latter struck him on the head with a crash helmet, P63. The deceased fell to the ground. OKT1 continued to hit him with the crash helmet and kicked him repeatedly;

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(e) Subsequently, OKT2 came back, brought along a parang, P86. OKT2 said 'Baru hang ada akal sebab hang duk buat macam ni kat orang. Hang duk kencing kat orang. Hang duk buat kat orang.' SP14 understood this to mean the deceased had done bad things or played out other people by taking their goods but did not pay them.

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[23] Be that as it may, the testimony of SP14 was consistent and corroborated by the evidence of the forensic pathologist, Dr Mohd Suhani

- A** bin Mohd Noor, SP8. Under the heading 'Marks of injury', SP8 had listed several injuries found on the deceased. These injuries may broadly be categorised as abrasions, lacerations, and bruises. They were not fatal in nature.
- B** [24] On examining the deceased, under the heading 'Skeleton', SP8 found the following fractures:
- (a) Fracture of the distal end of the 1st phalanx of left little finger.
- C** (b) Fracture of the middle phalanx of the left index finger.
- (c) Fracture of the styliod process of right ulna.
- (d) Comminuted wedge-shaped fracture of the upper third of the shaft of left tibia.
- D** (e) Comminuted wedge-shaped fracture near the distal end of left fibula.
- (f) Fracture of the head of left fibula.
- (g) Comminuted wedge-shaped fractures of the upper and middle thirds of the shaft, and fracture near the distal end of right tibia.
- E** (h) Comminuted wedge-shaped fracture near the distal end of right fibula.
- [25] The comminuted fractures of the fibula and tibia of the deceased are consistent with the assault by OKT2 using the reverse blade of the parang and not its sharp blade (p 111 of note of evidence).
- F**
- [26] Based on SP8's post mortem examination of the deceased, he opined firstly, the injuries seen on the deceased body was as a result of a hard and blunt impact; secondly, there was no natural disease detected on the deceased body which might have caused his death; thirdly, the injuries on the deceased
- G** head was serious and fatal in nature, and finally, the *cause of death was head injury due to blunt trauma*.
- [27] SP8 had prepared and produced the post mortem report marked P88.
- H**
- [28] The evidence of SP8 was never seriously challenged by the defence. Save that learned counsel contended that the learned deputy did not specifically ask SP8 whether the crash helmet, P63 could have caused such fatal injury, but I made the necessary finding that P63 could have caused such
- I** injury.

COMMON INTENTION UNDER S 34 OF THE PENAL CODE

[29] In this case the prosecution framed the charge with reference to

common intention under s 34 of the Penal Code. In the Court of Appeal case of *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466, Gopal Sri Ram JCA (as he then was) said at pp 50–51 (MLJ); pp 482–483 (CLJ):

To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s 34. In *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, Sethi J speaking for himself and Agrawal J said:

Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he snared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. (Emphasis added.)

[30] In *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arijit Pasayat J said:

Under the provisions of s 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s 34, when an accused is convicted under s 302 read with s 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch Pulla Reddy & Ors v State of Andhra Pradesh* AIR 1993 SC 1899, s 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34 it is not necessary to show some overt act on the part of the accused.

[31] In the recent case of *Low Soo Song v Public Prosecutor* [2009] 3 MLJ 36; [2009] 3 CLJ 309, Nik Hashim FCJ having referred to *Sabarudin bin Non* and *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528; [2006] 1 CLJ 1043 and in approving the above stated principle of s 34 said at p 44 (MLJ); p 318 (CLJ) as follows:

- A** The provision is intended to make a person liable for the action of an offence not committed by him but by another person with whom he shared the common intention. By invoking s 34, it means that the appellant was equally liable for the act of robbery in the same manner as if the act were done by him alone, notwithstanding that it was the other person who actually committed the offence.
- B**
- C** [32] At the close of the prosecution case, has the prosecution adduced sufficient evidence to establish an offence of murder within s 300 or culpable homicide as contained in s 299. The prosecution, of course, took the view that the evidence disclosed the offence of murder. In the case of *Yeap Boon Hai v Public Prosecutor* [2010] 2 MLJ 433; [2010] 2 CLJ 338, Low Hop Bing JCA who delivered the Court of Appeal judgment drew the distinction between culpable homicide and murder under ss 299 and 300 respectively. The relevant part of the judgment merits reproduction as follows:
- D** 299 Culpable homicide
- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
- E**
- 300 Murder
- Except in the cases hereinafter expected, culpable homicide is murder:
- F** (a) if the act by which the death is causing is done with the intention of causing death;
- (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- G** (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.
- H**
- I** [33] The Privy Council considered these two sections of the Singapore Penal Code (equipollent to our ss 299 and 300) in *Chung Kum Moey v Public Prosecutor* [1967] 1 MLJ 205. Viscount Dilhorne explained, inter alia, as follows:
- (a) The four limbs of s 300 were not mutually exclusive; and

(b) The contrast between the use of the words 'likely to cause death' in s 299 and the words 'sufficient in the ordinary course of nature to cause death' in the third limbs of s 300 indicated that a high degree of certainty was required to justify a conviction under that limb for murder.

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[34] In *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 Raja Azlan Shah FJ (now HRH the Sultan of Perak) delivered the judgment for the Federal Court and discussed in detail the distinctions between the two offences. The essential principles may be extracted as follows:

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- (a) whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely results, it is culpable homicide; if it is the most probable result, it is murder;
- (b) in the last analysis, it is a question of degree of probability; and
- (c) all cases falling within s 300 must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300.

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[35] Learned counsel for OKT1 submitted that OKT1 and OKT2 had no intention to kill the deceased. Firstly, after assaulting the deceased, either OKT1 or OKT2 had requested SP14 to call the ambulance, obviously to render medical assistance to the deceased. Secondly, the deceased's death was not instantaneous. The deceased died in the hospital. Coupled with the evidence that OKT2 had beaten the deceased legs below the knee which is not a vital organ of human anatomy and OKT2 used the reverse blade of the parang to hit the deceased instead its sharp side, all these evidences showed that, neither OKT1 nor OKT2 had the intention or mens rea to cause death to the deceased. Learned counsel cited the case of *Public Prosecutor v Kang Chee Whei* [2002] MLJU 550; [2002] 8 CLJ 807. Briefly, the facts are these. The deceased's body was found in the living room. His father noticed abrasions on the deceased's face and his back. A police report was lodged. A post mortem was conducted wherein the cause of death was 'fracture of skull and inter cranial bleeding'. As to how the deceased sustained the injuries, the investigation revealed that the passers-by had seen the accused swung a white crash helmet on the deceased head. The deceased did not retaliate. He fell. The deceased, before his death, informed his friend that he was hit with a crash helmet on the head by the accused. The deceased was taken to private clinic where he informed the doctor that his injuries were sustained in a road accident. The deceased was then referred to the hospital. After being informed that he was involved in a road accident, he was given an outpatient treatment. He went home with some medicines. He went straight to his bedroom. The next morning, he was found dead in his room by his mother.

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- A [36] The accused was charged with an amended charge under the second limb (b) of s 304 Penal Code, that is, culpable homicide not amounting to murder. The accused pleaded guilty and he was sentenced to nine years imprisonment with effect from the date of his arrest.
- B [37] ‘Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder’ per Low Hop Bing JCA in *Yeap Boon Hai*. On the totality of evidence adduced by the
- C prosecution, I was not satisfied that OKT1 and OKT2 intended to kill the deceased, particularly OKT1 or OKT2 had instructed SP14 to call for the ambulance. This is clearly with the view to take the deceased to the hospital to get medical treatment. Though several injuries were found on the deceased
- D body, they were mostly wounds which were not fatal in nature, saved the fatal injury on the head. The deceased succumbed to his injuries while in the hospital. It was not instantaneous death. I could not find the evidence of ‘intention’ as prescribed in limb (a), (b) and (c) of s 300.

DECISION AT THE CLOSE OF THE PROSECUTION CASE

- E [38] For the foregoing reasons this court, however, finds that the prosecution has made out a prima facie case against both OKT1 and OKT2 for an offence of culpable homicide not amounting to murder under s 304(a) of the Penal Code. Accordingly, pursuant to s 158 of the Criminal Procedure
- F Code, this court amended the charge to one under s 304(a) of the Penal Code read in conjunction with s 34 of the same Code as follows.

Pertuduhan Pindaan

- G Bahawa kamu bersama-sama pada 18 Jun, 2005, jam lebih kurang 2.30 pagi di Batu 6 %, Jalan Kaki Bukit, Beseri, dalam Negeri Perlis bagi mencapai niat bersama kamu berdua telah menyebabkan kematian Azmeer bin Azmi (No.KP: 620524-71-5099) dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan yang di baca bersama seksyen 34 Kanun yang
- H sama.

- I [39] The amended charge, P97 was read and explained to OKT1 and OKT2 respectively including the punishments under s 304(a), OKT1 and OKT2 voluntarily pleaded guilty to the amended charge, P97. The salient facts of the case were brought to the attention of OKT1 and OKT2 and both admitted without qualification, the offence alleged against them. Having satisfied that OKT1 and OKT2 understood the nature and consequences of their pleas, I have accepted their pleas of guilty. I accordingly convicted both

OKT1 and OKT2 on the amended charge, P97.

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MITIGATION AND SENTENCE

[40] Learned counsel for OKT2 had submitted a written mitigation which may be summarised as follows:

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- (a) OKT2 was a labourer and has separated from his family;
- (b) both OKT1 and OKT2 pleaded guilty immediately after the charge was amended to s 304(a) of the Penal Code, though representation was made earlier for the reduction of the charge, unfortunately it was not agreeable by the prosecution;
- (c) the facts disclosed that OKT1 and OKT2 went to the deceased house on that fateful morning to retrieve back OKT1's motorcycle which was being kept by the deceased. For no apparent reason the deceased refused to return the motorcycle;
- (d) both OKT1 and OKT2 were remorseful and fully regret over the death of the deceased who was his colleague;
- (e) both OKT1 and OKT2 had suffered nightmare and agony of facing death sentence by hanging until the original charge of murder was duly amended. This mental anguish is a grave punishment by itself; and
- (f) both OKT1 and OKT2 prayed that the shortest possible custodial sentence be imposed.

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[41] Learned counsel for OKT1 adopted the above mitigation and wished to add as follows:

- (a) OKT1 was doing odd jobs in the *kampong* before he was arrested;
- (b) OKT1 was a first offender.

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[42] In reply, the learned TPR prayed for a deterrent custodial sentence based on the following factors:

- (a) The guilty plea of OKT1 and OKT2 is not automatic for them to get lenient custodial sentence; *Public Prosecutor v Kammoon Wannga & Anor* [2009] 8 MLJ 430. The pleas of guilty were only entered after the charge was amended. The trial had proceeded until the conclusion of the prosecution case with 20 witnesses called;
- (b) No discount of custodial sentence be given;
- (c) Public interest should prevail over personal interest of OKT1 and OKT2: See *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167;

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- A (d) The offence under s 304(a) is a very serious offence. The deceased had perished forever and his life cannot be redeemed;
- (e) If lenient sentence is imposed, it sends a wrong message to the public at large;
- B (f) The facts disclosed that the deceased was attacked mercilessly with a crash helmet and the reverse of a parang until the deceased begged for leniency. SP14 attempted to stop the attack but was rebuffed by both OKT1 and OKT2;
- C (g) The facts in *Kammoon Wannga & Anor*, the case decided by this court, may be distinguished with the facts in this case. In that case accused was drunk. In this case, the assault was pre-meditated and OKT1 and OKT2 was armed with a parang. The attack on the deceased was repetitious and ferocious;
- D (h) OKT1 has no previous conviction;
- (i) OKT2 has seven previous convictions.
- E [43] I do not propose to deal with principles and guidelines of sentencing as I have dealt with it at length in the case of *Kammoon Wannga & Anor*. There is no doubt that OKT2 had seven previous convictions but of different type of crimes, the last conviction being in the year 2001 for an offence of harbouring illegal immigrant, a gap of nine years with the present case. Though OKT1 and OKT2 pleaded guilty to the amended charge, P97, I do not consider OKT1 and OKT2 pleas of guilty as mitigating factors and no discount is given. In the circumstances of this case, I sentenced OKT1 and OKT2 to 12 years imprisonment each with effect from the date of their arrest.
- F
- G *Both accused convicted and sentenced on amended charge.*

Reported by Andrew Christopher Simon

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